No. 80-1061

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOHN WATERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1069

LAY FACULTY ASSOCIATION, LOCAL 1261, PETITIONER

v.

BISHOP FORD CENTRAL CATHOLIC HIGH SCHOOL AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. On May 15, 1978, the Board issued a decision finding that the Henry M. Hald Association ("Hald") and the Roman Catholic Diocese of Brooklyn ("the Diocese") violated Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (5), by failing to bargain in good faith with petitioner, the representative of the full-time lay faculty at the Bishop Ford High School, concerning the decision to close the school and transfer its facilities to respondent Bishop Ford Central Catholic High School ("Ford Central"). The Board further found that Ford Central, which is operated by a board of nine lay and three religious trustees, was a successor employer to Hald and the Diocese and accordingly that it violated Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain with petitioner, and violated Section 8(a)(1) and (3) of the Act,

29 U.S.C. 158(a)(1) and (3), by refusing to employ Daniel Caffrey because of his union activities at Bishop Ford. The Board entered a remedial order against Hald, the Diocese, and Ford Central. 236 N.L.R.B. 1 (1978). Hald and the Diocese sought review of the Board's decision and order in the United States Court of Appeals for the Second Circuit, and the Board cross-petitioned for enforcement.

While the case was pending in the court of appeals, this Court held in *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979), that the Act does not cover teachers in "church-operated" schools. Accordingly, the court of appeals remanded the case to the Board for dismissal of the complaint against Hald and the Diocese,[1] and for reconsideration of the order against Ford Central in light of *Catholic Bishop* (Pet. App. E1-E4).

2. On June 25, 1979, the Board issued a supplemental decision dismissing the unfair labor practice complaint against Hald and the Diocese, but affirming the order issued against Ford Central, which, *inter alia*, required it to bargain with petitioner (Pet. App. D1-D15).[2] The Board concluded that *Catholic Bishop* did not preclude the Board's assertion of jurisdiction over the teachers at Ford Central because it was not a "church-operated" school (*id.* at D13). The Board explained (*id.* at D13-D14):

> In *Catholic Bishop of Chicago* the schools involved were operated by the Archbishop of Chicago or the Diocese of Fort Wayne-South Bend. Similarly, Bishop Ford High School, the "old" school, was operated by

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[1]All parties except petitioner had stipulated that *Catholic Bishop* required dismissal of the case as to Hald and the Diocese (Pet. App. E2-E3).

[2]Member Penello would have dismissed the complaint against Ford Central as well (Pet. App. D16-D23).

the Diocese of Brooklyn. However, beginning with the 1976-77 school year, Bishop Ford Central Catholic High School operated as a separate institution, governed by an independent, lay board of trustees over whom the Diocese had no control. The Diocese has no representatives on the board; Ford Central hired its own staff and set its own policies with no input from the church. There is no evidence of the Diocese exercising any control or influence over the operation of this school. As such, it is clearly beyond the definition of a "church-operated" school. Ford Central is an entity separate and distinct from the church. There would be no danger here, in asserting jurisdiction, of entanglement of the government with the church. [Petitioner] will be negotiating with an entity which, whatever the religious orientation of its curriculum, is unconnected with the Diocese, over a unit consisting of lay teachers at the school.

3. The court of appeals denied enforcement of the Board's order (Pet. App. A1-A15). The court held that the term "church-operated" utilized in *Catholic Bishop* was intended to denote not only a school that is under diocesan ownership and management, but also a school divorced from such ownership and management whose faculty is nonetheless obligated "to imbue and indoctrinate the student body with the tenets of a religious faith" (*id.* at A10). In the court's view, the danger of Board entanglement with the religious missiion of the school exists in the latter situation no less than in the former. Finding that the obligation of both the lay and religious faculty at Ford Central was "to propagate the Roman Catholic faith and to indoctrinate the student body with the tenets of that faith" (*id.* at A8), the court concluded that, even if Ford Central were completely divorced from diocesan ownership and control, it was a "church-operated" school within the meaning of *Catholic Bishop* (*id.* at A12).

In addition, the court found that "the Diocese here has not completely severed its relationship with Ford Central but has restrained a significant degree of control" (Pet. App. A13). The court explained (*ibid.*):

> While the ownership and operation of the school has been left in the hands of a lay board of trustees who have selected religious administrators and a professional staff predominantly affiliated with religious orders, the agreement of September 3, 1976 explicitly provides that "the 'Diocese' is desirous of making the property herein described available for the purposes of the operation of a Roman Catholic high school upon the conditions herein set forth." The first condition of the agreement is that Ford Central shall have and hold the property "so long as the grantee continues the operation of a Roman Catholic high school . . . upon the cessation of which all rights, title and interest herein conveyed shall revert to the grantor, or its successor." Paragraph 5 of the agreement further provides that if the grantee shall "cease so to operate said high school, title to the premises herein described shall automatically revert to the 'Diocese' without further action on its part."
>
> It is the clear and unambiguous intent of the agreement that Ford Central continue to operate as a Roman Catholic secondary school and if the institution should deviate from its religious mission, the Diocese has the right to intervene and automatic reversion to the Diocese ensues. The position of the Board that Ford Central is a legal entity "separate and distinct from the Church" is we submit irrelevant and in any event not accurate. Ford Central is only conditionally separated from the Diocese and the condition imposed is its continuing allegiance and loyalty to the Church.

4. The Board agrees with petitioner (Pet. 21-34) that the court of appeals erred in interpreting *Catholic Bishop* as excluding from the coverage of the National Labor Relations Act teachers in independently operated schools with a "religious mission" as well as those in schools that are owned or operated by a religious institution. However, the Board did not file a petition for a writ of certiorari because, in its view, it is unnecessary to resolve that issue here. The court of appeals' decision also rests on the finding that the Diocese has retained "a significant degree of control" over Ford Central's operations (Pet. App. A13). While the Board disagrees with this factual determination, it raises only an evidentiary issue that this Court would be unlikely to review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). If the petition for a writ of certiorari is granted, however, the Board will undertake to defend its decision and order.

Respectfully submitted.

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Solicitor General

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